

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**THOMAS PENISTEN**  
Claimant

**HY VEE INC**  
Employer

**APPEAL 21A-UI-23825-JD-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 10/25/20**  
**Claimant: Respondent (2)**

Iowa Code § 96.5(1) – Voluntary Quit  
Iowa Code § 96.3 (7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10– Employer Participation in Fact-finding Interview  
PL 116-136, Sec.2104 – Lost Wage Assistance Federal Pandemic Unemployment  
Compensation

**STATEMENT OF THE CASE:**

On October 27, 2021, the employer filed an appeal from the October 22, 2021, (reference 05) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 22, 2021. Claimant Thomas Penisten participated and testified. Employer participated through Barbara Buss, hearing representative, and Joseph Van Arsbaile, Human Resources Manager and DeWayne McIntyre, Store Manager. Official notice was taken of the administrative record.

**ISSUES:**

Did claimant voluntarily quit the employment with good cause attributable to employer?

Has the claimant been overpaid any regular unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

Has the claimant been overpaid any Lost Wages Assistance (LWA) benefits?

Has the claimant been overpaid any FPUC benefits?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on December 29, 2020. Claimant last worked as a part-time online personal shopper. Claimant was separated from employment on April 15, 2021, when he voluntarily quit because he no longer felt comfortable filling his grocery orders in the back room of the store where he worked. The employer attempted to find other jobs for the claimant but none of those other positions were acceptable to him. The employer had a policy that all employees wore masks during work hours. The claimant had alerted the employer that an

employee was not wearing a mask on April 12, 2021. The manager on duty patrolled the store and did not discover any employees that were violating mask policy. The claimant indicated that he didn't feel that packing groceries in the back room was safe despite the employer mandating that all employee's wear masks. The claimant testified that the fact he was required to fulfill his online orders on the sales floor amongst customers who were not required to wear masks was not an issue for him.

Claimant's administrative records establish that she has received regular State of Iowa funded unemployment insurance benefits of \$881.00 from April 11, 2021 through May 8, 2021. Claimant did not receive any LWA benefits in 2021 so the issue of LWA benefit overpayment is moot. Claimant has received FPUC benefits of \$1,200.00 from April 11, 2021 through May 8, 2021.

The employer did not participate in the Fact-finding interview conducted on October 21, 2021.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant's separation from the employment was without good cause attributable to the employer.

Iowa Code §96.5(1) provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Admin. Code r. 871-24.25 in pertinent part provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

- (21) The claimant left because of dissatisfaction with the work environment.

Claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual, or the claimant in particular. *Uniweld Products v. Indus. Relations Comm'n*, 277 So.2d 827 (Fla. Dist. Ct. App. 1973). A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

The claimant testified that he was concerned about other Hy-Vee employees not wearing masks while they worked. The employer required all employees to wear masks during their shifts. The claimant alerted the employer on several occasions regarding employees violating this policy but when the employer investigated these claims they never discovered any employees violating the

mask rule. The claimant's assertion that he felt safer on the sales floor mingling with customers who were not required to wear masks strains his credibility. The employer provided several other employment options to the claimant but those positions were not acceptable to the claimant for various personal reasons. The claimant's decision to quit his employment due to his own personal safety issues does not equate to good cause attributable to his employer. The claimant's decision to quit was his to make but his decision does not allow him the opportunity to receive unemployment compensation benefits. Benefits are denied.

II. Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived and charged to the employer's account?

For the reasons that follow the administrative law judge finds, the claimant was overpaid regular unemployment insurance benefits in the amount of \$881.00 which he is not required to repay, because the employer did not participate in the fact-finding interview and its account shall be charged.

Iowa Code section 96.3(7)a, b, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in [871-subrule 24.32\(7\)](#). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files an appeal after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7) "b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. Iowa Code § 96.3(7). However, an overpayment, which results from a reversal of an initial allowance of benefits based on a separation, will not be recovered if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. Iowa Admin. Code r. 871-24.10(1). The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10.

The claimant did not receive benefits as a result of fraud or misrepresentation and the employer did not participate in the fact-finding interview despite proper notice and an opportunity to participate.

In this case, the claimant has received benefits, but he was not eligible for those benefits. The employer did not participate in the fact-finding interview after being given proper notice and an opportunity to participate. Since the employer did not participate in the fact-finding interview, the claimant is not obligated to repay to the agency the benefits he received, and the employer's account shall be charged.

### III. Has the claimant been overpaid FPUC benefits?

The administrative law judge finds that he is.

PL116-136, Sec. 2104 provides, in pertinent part:

#### (b) Provisions of Agreement

(1) Federal pandemic unemployment compensation.--Any agreement under this section shall provide that the State agency of the State will make payments of regular compensation to individuals in amounts and to the extent that they would be determined if the State law of the State were applied, with respect to any week for which the individual is (disregarding this section) otherwise entitled under the State law to receive regular compensation, as if such State law had been modified in a manner such that the amount of regular compensation (including dependents' allowances) payable for any week shall be equal to

(A) the amount determined under the State law (before the application of this paragraph), plus

(B) an additional amount of \$600 (in this section referred to as "Federal Pandemic Unemployment Compensation").

....

#### (f) Fraud and Overpayments

(2) Repayment. – In the case of individuals who have received amounts of Federal Pandemic Unemployment Compensation to which they were not entitled, the State shall require such individuals to repay the amounts of such Federal Pandemic Unemployment Compensation to the State agency...

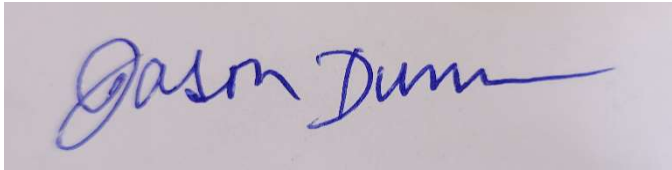
In this case, the claimant received FPUC benefits but was not eligible for those benefits. This was because of the disqualifying separation from employment. As such, the claimant is overpaid FPUC benefits in the amount of \$1,200.00 from April 11, 2021 through May 8, 2021.

**DECISION:**

The October 22, 2021, (reference 05) unemployment insurance decision is reversed. Claimant voluntarily quit employment without good cause attributable to the employer. Unemployment insurance benefits funded by the State of Iowa are denied until the claimant has worked in and earned wages for insured work equal to ten times her weekly benefit amount after his April 15, 2021, separation date, and provided he is otherwise eligible.

The claimant has been overpaid unemployment insurance benefits of \$881.00 between April 11, 2021 and May 8, 2021, and is not obligated to repay the agency those benefits he received. The employer did not sufficiently participate in the fact-finding interview and its account shall be charged for those benefits paid.

The claimant has been overpaid FPUC benefits in the amount of \$1,200.00 from April 11, 2021 through May 8, 2021. Those benefits must be repaid to the agency.



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Jason Dunn  
Administrative Law Judge  
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Des Moines, Iowa 50319-0209  
Fax (515) 478-3528

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January 26, 2022  
Decision Dated and Mailed

jd/kmj

**Note to Claimant**

- This decision may determine you are not eligible for regular unemployment insurance benefits funded by the State of Iowa under state law and if you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.
- The claimant may apply for a waiver of his FPUC overpayment at:  
<https://www.iowaworkforcedevelopment.gov/application-overpayment-waiver>